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SECOND LOS ANGELES INTERNATIONAL
AIRPORT RATES PROCEEDING

) Docket OST-95-474 - 65
)

**COMPLAINANTS' RESPONSE TO RESPONDENTS' OBJECTIONS TO
COMPLAINANTS' EXHIBITS AND TESTIMONY FOR THE HEARING**

Pursuant to the Prehearing Schedule agreed to by the parties and approved by Judge Kolko, dated October 6, 1995, Complainants hereby submit the following response to Respondents' Objections to Complainants' Exhibits, Supplemental Exhibits, Declarations and Supplemental Declarations ("Resp. Objections").

RESPONSE TO GENERAL OBJECTIONS

Respondents have objected generally to Complainants' designation of exhibits related to the Airport's attempt unlawfully to divert airport revenues downtown for general economic purposes on the ground that such evidence is "irrelevant, immaterial, and beyond the scope of the Court's authority in this case as set forth in the Instituting Order." See Resp. Objections at 1-3.

As the Secretary recognized in his Instituting Order, however, Complainants' revenue-diversion evidence is "relevant to the extent that it shows that the City has a motive for increasing the landing fees as much as possible." Order 95-9-24 at 22. Accord Order 95-4-5 at 25 (the Airlines' revenue-diversion "allegation is relevant to the extent that it shows that the City has a motive for increasing the landing fees to allegedly unreasonable levels"). The federal courts have taken the same position and looked to the existence of "bad faith" or improper motive on the part of the rate-setting authority in establishing the reasonableness

of challenged airport fees. See, e.g., American Airlines v. Massachusetts Port Authority, 560 F.2d 1036, 1039 (1st Cir. 1977).

So did this Court, in Investigation into Massport's Landing Fees (FAA Docket 13-88-2) (U.S. Dep't of Trans. 1988) (Kolko, J.). The Massport Rates Proceeding involved a challenge to the landing fees at Boston's Logan airport. Among other things, the complainants in that case argued that Massport had embarked on a plan to rid Logan of small aircraft and had adopted the challenged landing fees to accomplish that objective. Massport denied that allegation and argued that its "intent and motive" in adopting the challenged fees was irrelevant as a matter of law. Id. at 49. This Court flatly "disagree[d] with Massport that its documented intentions [were] irrelevant," id., and, moreover, specifically relied upon those intentions in striking down the challenged fees:

It appears clear that the [challenged] fees unfairly and unreasonably penalize the smaller aircraft by allocating to them a disproportionate amount of airport costs. After careful review, it is difficult to walk away from the record of this case without inferring that the Massport PACE Plan was conceived, orchestrated and implemented with the principal objective of ridding Logan of small aircraft or severely curtailing their objectives. It was a plan that went in search of an economic theory to justify its existence. [Id. at 53.]

In this case, of course, LADOA is not seeking to rid LAX of small airlines, but instead to inflate fees beyond that necessary to capture LAX's actual costs in order to generate surplus revenues for diversion downtown. The exhibits to which Respondents have so strenuously objected plainly and clearly document that motive. As the Secretary, this Court, and the federal courts have all concluded, that motive is relevant -- and material -- to the reasonableness of the challenged fees.

It also is plainly within the scope of this proceeding, just as it was in the prior rates proceeding. See Recommended Decision of Chief Administrative Law Judge John J. Mathias at 31 (citing numerous record exhibits establishing "the

City's expressed desire to somehow share in the profits of LAX"). To avoid this conclusion, Respondents hang their hat on the Secretary's remark that "the hearing should not consider * * * the Airlines' claims that the City has been planning to increase fees so that the airport will generate surplus revenues that can be transferred to the City's general fund." Order 95-9-24 at 22 (emphasis added). But Complainants do not seek to litigate any separate "claim" at the hearing that the Airport has improperly diverted funds downtown. Instead, they seek to introduce evidence documenting Respondents' diversionary intent in order to show LADOA's true motive for adopting the challenged, unreasonable fees. The Secretary's Instituting Order plainly permits this Court to consider that evidence.

In the sentence immediately following the one Respondents' quote, the Secretary observed: "While [Complainants'] allegation [of LADOA's diversionary intent] may be relevant to the extent that it shows that the City has a motive for increasing the landing fees as much as possible, the hearing should focus on whether the increased fees are justified by the airport's costs." Id. (emphasis added). Complainants do not seek to have the hearing "focus" on anything else -- and indeed, have addressed all of their hearing "claims" to that issue -- but instead seek to introduce evidence relevant to LADOA's motive in adopting the challenged fees. That evidence underscores the importance of closely scrutinizing the dramatic increase in LAX landing fees, the basis for the disputed charges, and, in particular, the permissibility of the millions of dollars of challenged city service charges. The Secretary's Order in no way precludes the introduction of this motive evidence at the hearing. 1/

1/ Respondents have separately objected to the introduction of Complainants' evidence relating to the \$59 million transfer of so-called "Cal Trans" funds to the City last winter. See Resp. Objections at 2. This evidence was offered to show the Airport's diversionary intent and is plainly relevant in that regard. Complainants have not requested -- and do not seek -- a determination as to the legality of that

RESPONSE TO SPECIFIC OBJECTIONS

In addition to the foregoing general objections, Respondents make numerous specific objections to Complainants' documentary and testimonial exhibits. These objections are addressed seriatim below. As a threshold matter, however, Complainants urge the Court to reject all objections asserted on the ground of "materiality," since (as framed by Respondents at least) those objections are duplicative of Respondents' objections on the ground of relevance. Respondents have no made effort to distinguish how these two objections differ within the context of particular documents.

DOCUMENTS

Exhibit

Response

ATA-17

Paragraphs ¶¶ 1-31 of Mr. Enarson's declaration provide relevant background facts and/or are relevant to the Airport's revenue-diversion motive and thus within the scope of the proceeding for the reasons discussed above. See supra at 1-3. (Complainants will withdraw their designation as to the remaining paragraphs.) That Mr. Enarson has not been designated as a hearing witness in this proceeding in no way diminishes the relevance of this exhibit. Respondents had a full opportunity to cross-examine Mr. Enarson on his testimony in the prior proceeding. Finally, Complainants have not sought to incorporate this exhibit by reference, but instead have offered the exhibit into evidence.

transfer in this proceeding. And, contrary to the assertion of Respondents (see id.), the fact that this transfer is the subject of a separate proceeding before the FAA does not prevent this Court from considering the transfer in this proceeding to the extent it is probative of the issue of motive. Any contrary conclusion would permit Respondents to shield from scrutiny the full breadth of their revenue-diversion campaign simply because, as a result of the fact that the campaign is being waged on such a wide front, different elements of the campaign are subject to the jurisdiction of different federal enforcement authorities.

- ATA-23 Complainants will withdraw this exhibit.
- ATA-48 This exhibit is relevant to the Airport's revenue-diversion motive and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3.
- ATA-49 This exhibit is relevant to the Airport's revenue-diversion motive and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3.
- ATA-50 This exhibit is relevant to the Airport's revenue-diversion motive and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3.
- ATA-51 This exhibit is relevant to the Airport's revenue-diversion motive and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3 & n.1.
- ATA-62 This exhibit is relevant to the Airport's revenue-diversion motive and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3 & n.1.
- ATA-79 Mr. Horngren's prior testimony as to the reasonableness of the 1993-94 landing fees provides relevant background material as to the challenged 1995-96 fees, since the new fees are based on the same basic John Brown methodology (even though they contain significant new elements and charges). That this is so is confirmed by the fact that Respondents have themselves designated the prior testimony of Messrs. Brown and Driscoll (in its entirety) in this proceeding. Respondents' objection that Mr. Horngren's testimony is duplicative of Mr. Barker's testimony is groundless, was repeatedly rejected in the prior proceeding, and should again be rejected here.
- ATA-83 Respondents' objection is groundless for the reasons stated in Complainants' Opposition to Respondents' Motion to Strike Portions of the Supplemental Declaration III of Kenneth J. Barker, the Supplemental Declaration II of Charles T. Horngren, and Ex. ATA-83, filed herewith.

DECLARATIONS

1. Barker Testimony

<u>Objection</u>	<u>Response</u>
Relevance (Decl. ¶ 4)	Mr. Barker's prior testimony is relevant for the same reasons that pertain to Mr. Horngren's prior testimony and which are set forth in Complainants' response to Respondents' objection to Ex. ATA-79 above.
Speculation/ Lack of Foundation	<p>(Decl. ¶¶ 7-47, Suppl. ¶¶ 3-36). Mr. Barker participated as an expert witness in the past proceeding and is now, as a result of his participation in and review of the documents designated in his work papers in this and the prior proceeding, familiar with the present and past practices of LADOA.</p> <p>(Suppl. ¶¶ 10,15,17,24,26,28). As an expert in cost allocation, cost accounting, and other complex financial matters with over 20 years of experience in the Accounting and Audit Division of Arthur Anderson, Mr. Barker is plainly qualified to testify to the types of documents that would be needed to ascertain the reasonableness of certain charges or allocation methodologies. Moreover, Mr. Barker has repeatedly explained the types of documents that the Airlines have been provided by LADOA and that he has reviewed in rendering his opinions, and explained what additional information is needed to assess certain charges.</p> <p>(Suppl. ¶ 28). Because the Airport refused to provide the Airlines with a break-down of the location at which reported crimes were committed at LAX, Mr. Barker was forced to make the logical assumption that crimes like robberies, purse snatching, and aggravated assaults are "most likely" to occur in the parking lots and terminal areas, as opposed to the airfield and apron areas, which such victims rarely -- if at all -- frequent. There is no basis for striking this testimony.</p>
Relevance/ Beyond Scope of Instituting Order (Decl. pp. 24-26, Suppl. 24-26,	This testimony consists of charts breaking down the total effect of the challenged fees on the 1995-96 landing fees and is relevant to the issue of the specific charges challenged in this proceeding and to refunds, which the Secretary has directed this Court to calculate. <u>See</u> Order 95-9-25 at 21. To the extent these charts reflect land rental, amortization, and Van Nuys

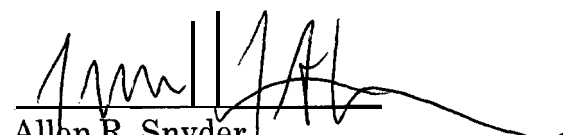
Suppl. III pp. 13-15, Suppl. IV ¶ 5)	expenses, they are subject to the proffer made at pp. 7-8 of Complainants' Designation of Testimony and Exhibits for the Hearing.
Duplicity (Suppl. ¶¶ 17-18, Suppl. III, Suppl. IV).	In explaining his positions in supplemental declarations to refine a point based on additional information recently obtained from Respondents, Mr. Barker has sometimes briefly restated the positions he has taken in prior declarations. Mr. Barker has done so for the convenience of the Court and so that his position is made clear in the context of particular documents or charges. There is no basis for striking this testimony.
Beyond Scope of Instituting Order (Suppl. III ¶¶ 2-5, 13-17).	Respondents' objections to ¶¶ 2-5 and 13-17 of Mr. Barker's third supplemental declaration should be rejected for the reasons stated in Complainants' Opposition to Respondents' Motion to Strike Portions of the Supplemental Declaration III of Kenneth J. Barker, the Supplemental Declaration II of Charles T. Horngren, and Ex. ATA-83, filed herewith.

2. Horngren Testimony: At the Prehearing Conference, this Court denied Respondents' motion to strike Mr. Horngren's declaration as duplicative of Mr. Barker's declaration (Tr. at 75). Now, Respondents have repeated the very same "duplicity" objections to Mr. Horngren's hearing testimony. These objections should be once again rejected. Mr. Horngren and Mr. Barker, with very different professional backgrounds and experience, agree in their assessment of the unreasonableness of numerous aspects of the challenged fees. But that should not deprive Complainants of their right to present the expert testimony of more than one witness (whom Respondents may cross-examine at the hearing). Moreover, Mr. Horngren is a world-renowned cost-accounting academic and expert whose testimony is highly relevant as to the reasonableness of the challenged fees and allocation methodologies. Respondents' objection to Mr. Horngren's second supplemental declaration should be rejected for the reasons stated in Complainants' Opposition to Respondents' Motion to Strike Portions of the Supplemental

Declaration III of Kenneth J. Barker, the Supplemental Declaration II of Charles T. Horngren, and Ex. ATA-83, filed herewith.

3. **Mooney Testimony:** Mr. Mooney's testimony as to the revenue-diversion pressures exerted on municipal airports is not speculative, but instead grounded in Mr. Mooney's 40+ years' experience in the field of airport administration. This testimony is relevant to the basis for the Airport's revenue-diversion motive, is relevant to the reasonableness of the fees at issue here, and is within the scope of the proceeding for the reasons discussed above. See supra at 1-3.

Respectfully submitted,



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Dated: October 16, 1995

CERTIFICATE OF SERVICE

I, Jonathan L. Abram, counsel for the Airline Complainants and Intervenor Air Transport Association of America, hereby certify that true copies of the foregoing Complainants' Limited Response To Respondents' Motion To Strike Portions of the Supplemental Declaration III of Kenneth J. Barker, the Supplemental Declaration II of Charles T. Horngren and Ex. ATA-83 and Request for Reconsideration and Complainants' Response to Respondents' Objections to Complainants' Exhibits and Testimony for the Hearing were served on October 16, 1995 upon the following individuals:

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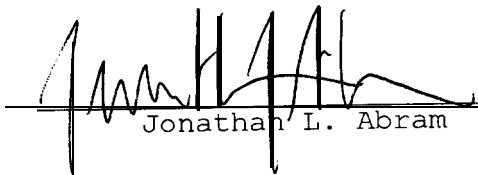
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